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IN THE

Supreme Court of the United States

October Term, 1964

No. 605

DAVID MCREYNOLDS and FRITZ PAPPENHEIM,

Petitioners,

vs.

ROBERT K. CHRISTENBERRY, Postmaster, New York, New York; JOHN A. GRONOUSKI, Postmaster General of the United States; DOUGLAS DILLON, Secretary of the Treasury of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The opinion of the District Court for the Southern District of New York (R. 135-147; Appendix, *infra*, pp. 2a-11a) is not yet reported. There is no opinion of the Court of Appeals, this petition being submitted prior to judgment therein.

Jurisdiction

The opinion of the District Court dismissing the amended complaint was filed on July 31, 1964; and judgment thereon (R. 150-152; Appendix, *infra*, p. 1a) was thereafter entered. The notice of appeal to the Court of Appeals (R. 148) was filed on August 18, 1964; the record on appeal was filed and the case docketed in the Court of Appeals (as No. 29,146) on September 2, 1964.

This action arose under Section 4008 of Title 39 of the United States Code (Public Law 87-793, Laws of October 11, 1962, 76 Stat. 840, effective January 7, 1963), which section regulates delivery of unsealed mail by the United States Post Office. The District Court had jurisdiction of this action pursuant to Section 1339 of Title 28 of the United States Code, in that it is a civil action arising under an Act of Congress relating to the postal service.

This Court has jurisdiction to grant this petition under United States Code, Title 28, Section 1254(1), providing for review by writ of certiorari of any case in the courts of appeals either before or after rendition of judgment.

Questions Presented for Review

1. Whether the Postmaster General can avoid judicial review of the constitutionality of his powers under a statute relating to "communist political propaganda," by modifying its application to petitioners because of their institution of suit, and even though he continues to list them as persons desiring delivery of "communist political propaganda."

2. Whether the statute giving the Postmaster General power to classify unsealed mail as "Communist political

propaganda" and to destroy it unless the addressee explicitly requests delivery of such "propaganda," violates the First, Fourth and Fifth Amendments to the Constitution.

Statutes Involved

Title 39, United States Code, Section 4008, hereinafter called the statute, reads:

Communist political propaganda

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U. S. C.

611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).

Title 22, United States Code, Section 611, reads in part:

Definitions

• • •

(j) The term "political propaganda" includes any . . . communication . . . (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the

United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. . . .

Statement of the Case

Allegations of Amended Complaint (R. 24-43)

Under 39 U. S. C. 4008 an addressee is notified of a decision that his mail is "Communist political propaganda," by a postcard. The card states that the Post Office is holding mail for him which "Under Public Law 87-793, the Customs Bureau of the Treasury Department has determined . . . to be Communist political propaganda," and that the mail will not be delivered unless he "want(s) it," and so directs the Post Office on the return part of the card. If the card is not returned by a specified date—set at approximately 20 days after the notification—"it will be assumed" the addressee does not want the mail (Exhibits B and E to the Complaint; reproduced in Appendix, *infra*, pp. 12a, 13a).

Plaintiff McReynolds received the "Communist political propaganda" notice with respect to an issue of a leaflet called "The Crusader". He did not request delivery because making the request required that he list himself with a Government agency as an individual desiring delivery of "Communist political propaganda". Further, because of the Post Office classification of "The Crusader," plaintiff McReynolds abstained from depositing in the domestic mail a prior issue of "The Crusader" which he had

received free of Post Office interception, for fear that it and his addressee would be subjected to the statutory procedure.

Plaintiff Pappenheim, a sociologist, purchased a number of books and pamphlets at a New York bookstore in December 1963, some of his use in preparation of a sociological treatise. They were mailed by the bookstore to his residence in Cambridge, Massachusetts, the return address on the package being that of the bookstore. The Post Office sent him the "Communist political propaganda" notification, listing thereon some of these books. He did not return the card requesting delivery because of unwillingness to list himself with a Government agency as an individual desiring "Communist political propaganda." After he had addressed two letters inquiring for further details to the Post Office, he received on March 6th the package of books purchased and mailed in December.[1]

The complaint alleged that the statute violates the First and Fifth Amendments, and asked for a declaratory judgment of its unconstitutionality, an injunction of its enforcement, expungement of plaintiffs' names from all lists and records indicating that they are addressees of "communist political propaganda," and damages for violation of their constitutional rights.

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[1] As a result of the filing of suit for Mr. Pappenheim, undersigned counsel received a letter from the President of the American Association for the Advancement of Slavic Studies, Professor Joseph S. Berliner of Brandeis University, stating that the "Association has long been interested in the legislation dealing with the confiscation of 'subversive' literature, much of which constitutes the stock in trade of our scholarly research efforts." Professor Berliner enclosed a memorandum summarizing an Association survey of its membership as to the effect of the statute, which appears in the Appendix, *infra*, pp. 14a-17a.

Defendants' Motion to Dismiss

The affidavit of the General Counsel for the Postmaster General, submitted with the Government's motion to dismiss, states that because of the filing of the instant suit, he instructed the New York Postmaster to deliver "all Communist political propaganda mail addressed to (plaintiff McReynolds) . . . as it is received in the future" without contacting plaintiff about it; the Postmaster replied that "all future mailings received for him will be promptly released for delivery" (R. 47-48). The same arrangement was made with respect to plaintiff Pappenheim (R. 133-134).

Before decision on petitioners' motion to convene a three-judge court and respondents' motion to dismiss the complaint, a three-judge court in the Southern District of New York decided *Lamont* v. *Postmaster General.* After Lamont's institution of suit contesting the constitutionality of the statute, the Post Office Department had issued the same instruction respecting the delivery of Lamont's mail as that issued herein and issued in the case of each plaintiff who has commenced suit.[2] The three-judge court dismissed Lamont's complaint as moot and non-justiciable. While the *Lamont* court indicated that the instant case was distinguishable (Jdl. St. Appendix pp. 13a-13b) and while the judge below also noted some points of difference, he dismissed the instant complaint on the basis of the *Lamont* decision.

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[2] See p. 11 of Jurisdictional Statement in *Lamont* v. *Postmaster General,* filed Sept. 12, 1964 (docketed as No. 491) hereinafter called "Jdl. St."

REASONS FOR GRANTING WRIT

I.

This writ is sought before judgment by the Court of Appeals because of the appeal pending in this Court in *Lamont* v. *Postmaster*. The instant case involves aspects of the statute related but additional to those in *Lamont*, and its consideration with *Lamont* would contribute to sound judicial administration.

The court below recognized that the instant complaint "involves not only mail sent from abroad, as in *Lamont*, but also mail deposited in the United States domestic mail" (Opinion, Appendix, *infra*, p. 6a). That is, plaintiff Pappenheim's complaint is based solely on the statutory provision for detention of "mail . . . which originates . . . in a foreign country . . . upon its subsequent deposit in the United States domestic mail"; and plaintiff McReynolds' complaint is based in part on the statute's coverage of such domestic mail.

Not only does the instant case present the issue of detention of domestic mail, which is not presented by the *Lamont* facts, but it also poses, as indicated in the *Lamont* opinion, the question of the rights of a sender of mail. In *Lamont*, in discussing mootness and the possibility of a suit by a *sender* of "communist political propaganda," the Court refers to the instant case saying: "It would not appear that such a suit could be mooted by any administrative action, and it would equally serve to secure full protection of the rights of recipients." (Note 5 of Opinion, Jdl. St. Appendix, pp. 13a-14a.)

The Court below belittles the issue in this case of detention of domestic mail (Appendix, p. 10a). But there is no

basis for this deprecation. The statute grants the Post Office power over matter deposited in the domestic mail; the Post Office exercised the power in the case of mail deposited in the domestic mail by a New York bookstore, bearing the return address of the bookstore, and sent the addressee the usual form as to "communist political propaganda" originating in a foreign country; it thereafter tried to moot his case by the same device it uses with respect to all other plaintiffs; it has made no answer or defense except to claim mootness. The District Judge strains for a supposition, when he says "any screening of domestically-deposited mail" may have been "an error" (Appendix, p. 10a). The only element of obvious fortuity in the Pappenheim case is that the addressee had particular knowledge and interest in the mailing of this package of books.[3] Indeed, it is due in part to this fortuity that a suit involving domestic sending could be filed; generally, senders might well be ignorant of whether mail they dispatched was detained or destroyed.

Since the instant case involves domestic mail as well as mail on its arrival from abroad, and the sender as well as the recipient of mail, it involves facts and issues closely related to, but varying somewhat from, those in *Lamont*. Grant of the writ would therefore permit this Court a more rounded view of the statute and of the constitutional issues, and also of the meaning and effect of the *Lamont* decision, followed herein, on mootness and justiciability. (Cf.

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[3] Petitioners have no way of knowing the Post Office's precise methods of enforcing its power under the statute over domestic mail. The *Pappenheim* facts suggest that it detains packages showing the return address of particular bookstores to determine whether their contents are "communist political propaganda". The statement in the opinion of the Court below as to screening units at ports of arrival of foreign mail (Appendix, p. 9a), is taken from the allegations in the complaint of the cause of action of plaintiff McReynolds relating to such mail, which repeats public statements by Post Office officials shortly after the statute became effective.

Bolling v. *Sharpe*, 347 U. S. 497, in which writ of certiorari was granted before judgment in the Court of Appeals because of pendency of a related case in this Court.) If, on the other hand, the *Lamont* case were reviewed alone by this Court, disposition of the instant case might well necessitate a re-canvass of the basic problems and thus prove wasteful from the standpoint of judicial administration.

II.

The decision of the Court below is in conflict with the decisions of this Court. It is a significant First Amendment ruling both in itself and because it precludes judicial consideration of novel and important First Amendment issues.

The *Lamont* decision, which the Court below followed in holding the instant complaint non-justiciable, errs, we believe, in its application of this Court's decisions both on mootness and on the First Amendment.

A. *Mootness.*

The first prong of the *Lamont* reasoning is that the plaintiff can no longer complain of the effect on First Amendment freedom of the requirement that he explicitly request delivery of "communist political propaganda," because the Post Office has directed that he receive all such matter without prior contact by the Postmaster (Appendix to Jdl. St., p. 6a). The three-judge court (one judge dissenting) reads as inapplicable the holdings of this Court that voluntary cessation of allegedly illegal conduct does not moot the cause. The *Lamont* court reaches this conclusion in large part on the basis that here the "Postmaster General's actions have at all times been consistent with the mandate of the statute" (Appendix Jdl. St., p. 8a). This, we believe, is

the court's error—its view that the Postmaster's direction to deliver the plaintiffs' mail was in accord with the statute, and the court's consequent failure to recognize that the direction was merely a maneuver to moot pending litigation.

The statute does not envisage the Postmaster's procedure here: it makes no provision for the Postmaster to determine that an addressee wants "all communist political propaganda" and to send him all such "propaganda"—or all his mail—without interruption. Rather, the statute provides for determination of whether an individual item of "mail matter" is "communist political propaganda" and for the delivery of such "matter" if the Postmaster ascertains it is "desired by the addressee". Further, the Post Office form to notify an addressee of the detention of "communist political propaganda" provides for the addressee to check that the Post Office either should or should not "Deliver the publication" listed on the card or "Deliver all publications of this type" (See Appendix, *infra*, pp. 12a, 13a). There is no regular procedure under this statute for an addressee to say "Deliver all mail". Thus, when the Post Office disingenuously says that it views the institution of suit as the expression of the plaintiff's desire for delivery of all his mail, it is adopting a device that is outside the purview of the statute and outside its regular procedure. Accordingly, it is apparent that the Post Office's sole purpose was to avoid court review; by the same token, if the cases are determined to be moot, the Post Office might well resume in regard to petitioners its regular and established procedure, since it would no longer have reason to deviate from it. Compare *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632-3, respecting need for adjudication because of possible resumption of practice.

This Court recently said: "[T]he voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing." *Gray* v. *Sanders*, 372 U. S. 368, 376. While those adjectives do not precisely apply to the Post Office detention of "communist political propaganda" under this statute, it is equally important that the practice here "voluntarily abandoned" is rooted in statute, admittedly continues for everyone other than litigants, and is entirely lawful as long as court review of the statute is avoided.

The situation here is to be compared—to the discredit of the Post Office, we suggest—with the situation in *Mechling Barge Lines* v. *United States*, 368 U. S. 324 (cited in *Lamont* dissent, Appendix Jdl. St., p. 18a). There appellants contended that the Commission had made it a practice to issue a type of order without findings, and to vacate "such order whenever a judicial test of its validity appears imminent, thereby frustrating any review on the ground of mootness" (368 U. S. at p. 333, dissent). In this Court, however, the Commission "represents that it has amended its practices [with respect to findings] . . . It thus appears that one of the 'continuing practices' whose validity appellants would have us adjudicate continues no longer" (368 U. S. at 330-331). Here, however, the Post Office asserts no change of practice—except for litigants. It seems no more acceptable for Federal agencies to maintain a procedure while frustrating review of its constitutionality, than for State agencies or State courts (compare *NAACP* v. *Alabama*, 377 U. S. 288; *Staub* v. *Baxley*, 355 U. S. 313, 318-320).

Aside from their rights as addressees which the Post Office has tried to moot, petitioners' rights as senders as

well as their claims for damages for enforcement against them of an unconstitutional statute (compare *Wheeler* v. *Wheeldin*, 373 U. S. 647, 649), have substance, and are unaffected by the Post Office's effort to moot.

B. *Justiciability of Claimed Violation of First Amendment Rights.*

The second prong of the *Lamont* decision, followed herein, that there is no justiciable controversy, rests on a failure to accord First Amendment rights the protection due them under this Court's decisions.

The basic First Amendment objection to the statute is: to require an addressee to list himself as desiring "communist political propaganda" imposes an unjustifiable impediment and deterrent to the circulation of reading matter. The complaint alleges what would in any event be inferred—that the plaintiffs, because of legislation, Congressional investigations, and public reaction respecting Communists, feared the consequences of exposing themselves as individuals desiring "communist political propaganda." (And see Appendix, *infra*, p. 16a, as to apprehension even of academicians about requesting delivery of "communist political propaganda".) This Court's decisions recognize that such a pervasive fear of consequences, resulting directly and specifically from a government requirement, imposes a restraint on the exercise of First Amendment rights. An imminent and precise catastrophe from the opprobrious disclosure is not requisite; it is the threat of *possible* damage that is significant and coercive. First Amendment freedom is fragile and vulnerable. See *Talley* v. *California*, 362 U. S. 60, 65; *NAACP* v. *Alabama*, 357 U. S. 449, 451, 462-3, 465; *Louisiana* v. *NAACP*, 366 U. S. 293, 295-6; *Shelton* v. *Tucker*, 364 U. S. 479, 486; *Watkins*

v. *United States,* 354 U. S. 178, 197-8; *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 126, 139, 159, 161, 186.[4]

The Court below and the *Lamont* court err in analogizing this case to those that have been held unripe for adjudication because Government action was there only threatened. Here the Government requirement of opprobrious disclosure has been and is being imposed, with present deterrent effect of constitutional dimension. The only speculative point is how far the consequences of the Government action will extend, and how far the fear—which is a real, present, and existing deterrent—will be substantiated. One likely consequence, it should be noted, is the continuance of the prior "practice of the Post Office to disclose to Congressional committees the names of recipients of communist propaganda" (see Appendix to Jdl. St., p. 12a). The respondents' only disclaimer on this point is that "the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. Government agency or other group, except with express permission from Post Office Department headquarters in Washington" (Affidavit of Associate General Counsel of Post Office Department, R. 45).[5]

Even assuming the Post Office has mooted the issue as to the requirement of a postcard request for delivery of "communist political propaganda," it has not substantially changed the First Amendment question herein. The Post Office now lists petitioners here and in *Lamont* as individ-

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[4] And the First Amendment unquestionably applies to regulation of second-class as well as first-class mail. See *Manual Enterprises* v. *Day,* 370 U. S. 478; *Roth* v. *United States,* 354 U. S. 476.

[5] As the *Lamont* dissent points out, the listed addressees would have no knowledge of the imminence of such a release of their names nor opportunity to then seek a remedy. See *Utah Fuel Co.* v. *Commission,* 306 U. S. 56, 60.

uals permanently desiring delivery of "communist political propaganda". The political content of their mail will continue to be subject to Government appraisal; they will receive what is appraised as "communist political propaganda" only because they are listed as desiring it; as long as the statute endures, they can have themselves de-listed only if they forego receipt of mail or make the postcard requests for delivery. Thus, the requirement of opprobrious self-exposure continues to operate on petitioners, and to restrain the First Amendment right to read and to communicate.

In sum, the decision of the Court below that the cause is non-justiciable is an erroneous application of this Court's decisions both on mootness and on the First Amendment. The misapplication is particularly significant because it forecloses review of important and novel constitutional questions.

III.

The statute presents important constitutional issues which should be and have not yet been, reviewed by this Court.

Operating as a deterrent and prior restraint on sending and receiving periodicals, books, leaflets, and other mail (*supra,* p. 13), the statute restricts the freedom to read and consider and the freedom to distribute and communicate. And the Government labeling of the reading matter of those who do get delivery of "communist political propaganda" unconstitutionally interferes with the free debate of ideas. See *Martin* v. *Struthers,* 319 U. S. 141, 143; *American Communications Association* v. *Douds,* 339 U. S. 382, 395; *Meyer* v. *Nebraska,* 262 U. S. 390, 401; *Whitney* v. *California,* 274 U. S. 357, 375 (dissent); *Leach* v. *Carlile,* 258 U. S. 138, 141; *Ex parte Jackson,* 96 U. S. 722, 733.

There is no conceivable evil that could justify, consistent with First Amendment principles, interference with the dispatch or receipt of the material covered by the term "communist political propaganda" as here defined; the statute therefore violates the Amendment. And in the absence of any general protection for addressees against delivery of unwanted mail, the First Amendment does not permit an allegedly protective measure which is directed only at the circulation of political ideas and which in fact restrains it.

The unjustifiable interference with privacy and the political surveillance imposed by the statute—albeit through inspection of unsealed mail—also present questions of violation of the Fourth and Fifth Amendments. Compare *Hannegan* v. *Esquire,* 327 U. S. 146; *School of Magnetic Healing* v. *McAnulty,* 187 U. S. 94, 110; *Barenblatt* v. *United States,* 360 U. S. 109, 127. In addition, the statute on its face and as applied violates the due process clause of the Fifth Amendment in that it employs an indefinite standard, arbitrary and unfair procedure, and an unreasonable discrimination as to the individuals subjected to restriction of their reading matter.

The statute is being applied throughout the country to thousands of pieces of mail monthly (Opinion of Court below, Appendix, *infra,* p. 3a); it employs a new device for the control of reading matter which has not been considered by this Court; its constitutionality under the First, Fourth, and Fifth Amendments should be reviewed by this Court.

CONCLUSION

It is respectfully submitted that this petition should be granted.

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